

(**SERVED**)
(**December 23, 1999**)
(**MARITIME ADMINISTRATION**)

**DEPARTMENT OF TRANSPORTATION
MARITIME ADMINISTRATION**

DOCKET No. MARAD-1999-6171

In the matter of the request by District No. 1, Pacific Coast District, Marine Engineer's Beneficial Association (MEBA), for a stay of the Maritime Administration's Order dated November 3, 1999, approving, pursuant to Section 9(c) of the Shipping Act, 1916, as amended, the transfer of registry from the United States to the Republic of the Marshall Islands of the Liquefied Natural Gas (LNG) Vessels: LNG ARIES, LNG AQUARIUS, LNG CAPRICORN, LNG GEMINI, LNG LEO, LNG LIBRA, LNG VIRGO, and LNG TAURUS.

**Order of the
Maritime Administrator
Denying Request for Stay**

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Maritime Administrator**

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A copy of this order is available on the Internet at the Department of Transportation Central Dockets Site "<http://dms.dot.gov>"(Search: "6171"; then review the most recent document filings listed for the "Order" filed this date); and by publication on the Maritime Administration Website at "http://www.marad.dot.gov/whats_new/".

I. INTRODUCTION

The Maritime Administrator herein addresses the request of District No. 1, Pacific Coast District, Marine Engineers' Beneficial Association ("MEBA"), for a stay of the Maritime Administration's ("MARAD") November 3, 1999 Order ("Order") conditionally granting approval to transfer the registry of the vessels LNG ARIES, LNG AQUARIUS, LNG CAPRICORN, LNG GEMINI, LNG LEO, LNG LIBRA, LNG VIRGO, and LNG TAURUS ("Vessels"), pursuant to Section 9(c) of the Shipping Act, 1916, as amended ("Act"), 46 App. U.S.C. §808, from the United States to the Republic of the Marshall Islands. For the reasons stated hereinafter, the Maritime Administrator ("Administrator") denies MEBA's request for a stay of the November 3, 1999 Order.

II. BACKGROUND

Applications for the transfer of two Vessels were filed on January 20, 1999, and applications for the transfer of six Vessels were filed on August 20, 1999. Notice of the applications was published in the *Federal Register* on August 30, 1999, 64 *Fed. Reg.* 47228, with a 15 day period for public comment. The closing date for the comment period was subsequently extended by MARAD to September 29, 1999. After reviewing extensive comments filed in response to the notice, MARAD issued an Order on November 3, 1999, granting approval to the Applicants to transfer the registry of the Vessels subject to certain conditions.

The Applicants subsequently agreed not to transfer the Vessels until a ruling was issued in an arbitration hearing between MEBA and PRONAV Ship Management, Inc. ("PRONAV"). We understand that a ruling was issued on December 14, 1999.

On December 9, 1999, MEBA filed suit in the United States Court of Appeals for the District of Columbia Circuit and petitioned the Court's review of the Order. In a letter to MARAD dated December 9, 1999, MEBA requested that MARAD not permit the transfer of the Vessels until such time as the Court has issued a dispositive ruling with respect to MEBA's Petition for Review of MARAD's November 3, 1999 Order. The Applicants filed comments in opposition to the request for a stay on December 13, 1999. MEBA replied on December 20, 1999; the Applicants responded on December 21, 1999; and MEBA filed a response on December 22, 1999.

III. DISCUSSION

Assuming MARAD has jurisdiction to issue the requested stay,¹ it appears there are four factors to be considered in determining whether to grant a stay: 1) Whether the appeal is likely to succeed on the merits; 2) Whether the movant will suffer irreparable harm if the stay is denied; 3) Whether other parties will suffer substantial harm if the stay is granted; and, 4) Whether the public interest is served by granting the stay.²

¹MEBA does not cite any explicit authority for its petition for stay. The petition sounds in part in reconsideration, although no reversal is sought; in part setting an effective date for the November 3, 1999 Order; and in part as a restraining order. Even in informal adjudication, an agency empowered to act may reconsider its action and set an effective date for its action. Applicant's Opposition also notes that 5 U.S.C. §705 authorizes an agency to "postpone the effective date of action taken by it, pending judicial review" when the agency finds that "justice so requires." Assuming applicability of that statutory provision to the agency action under section 9(c) of the Act, there would appear to be a basis therefore for consideration of MEBA's petition.

²*Special Counsel v. Campbell*, M.S.P.B. 1993, 58 M.S.P.R. 455 (indicating factors to be considered in issuance of a stay under Sec. 705.).

1) **Whether the appeal is likely to succeed on the merits.**

MEBA presents two arguments to be considered on the merits: a) that there are procedural due process defects in the manner in which the Order was decided, and b) that the Order contains significant factual errors indicating that the Order was arbitrary and capricious.

a) *Are there substantial due process defects in the manner in which the Order was decided?*

MEBA asserts that there are substantial due process defects in the manner in which the Order was decided. However, MEBA only makes a general statement that there are potential due process defects in the Order, and it fails to provide any information regarding specific due process flaws. Consequently, MARAD does not believe that MEBA would be successful on the merits of a due process claim or that the petition contains new information that would justify a stay of the Order.

MARAD provided an abundance of procedural due process. As a matter of discretion it noticed the application and provided ample opportunity to all parties to comment on the proposed reflagging. The original Notice provided a 15-day period for public comment. Thereafter, at the urging of MEBA, MARAD extended the comment period for another 15 days. supra at 1. By the September 29, 1999 cutoff date, the agency had received approximately one-thousand comments supporting MEBA's position. There is no statutory requirement for notice and comment under Section 9 of the Act. MEBA, or for that matter any party, had no statutory right to be heard in the *first place*. We note that the core principle of procedural due process is to impose constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments. Though there is no fixed rule on what

procedural due process affords, due process is flexible and calls for procedural protections as the situation demands. The agency fully met (indeed, exceeded) all applicable due process requirements.

b) *Are there significant factual errors indicating that the Order was arbitrary and capricious?*

MEBA contends that there are several factual errors in the Order that would render it unlawful. However, it only addresses one issue, MARAD's calculation on page 18 of the Order regarding the number of jobs that would be gained by the five-year contract contained in the Applicant's proposal. MEBA argues that the Applicant's proposal would in fact result in a loss of jobs. Therefore, MEBA asserts that this factual error creates a fatal flaw in the Order because MARAD expressly stated that it is very concerned about the potential loss of seagoing jobs.

A closer reading of MEBA's filings reveal that the dispute is not over the mathematical calculation of lost or gained jobs but the premise by the agency by comparing "MEBA's contract in terms of time with AMO's contract." MEBA's filing December 20, 1999. MARAD's conclusion on page 18 of the Order, that there would be a net gain in seafaring jobs, was derived from a comparison of the number of man-years of employment to be gained by the new five-year contract proposed by the Applicants with the man-years remaining in the two years of the agreement to which MEBA is a party. MEBA apparently insists that the only relevant comparison is the day after reflagging. Such a perspective overlooks the facts, among others, that these vessels have substantial income service for several years and that MEBA's Collective Bargaining Agreement expires in June 2001. MARAD's concern is with an adequate merchant marine, not merely on any given day, but more importantly over time. MARAD is not persuaded of any error in its decision. Accordingly, we do not find MEBA's

argument persuasive or to demonstrate that the Order is arbitrary and capricious and do not believe that MEBA would prevail on the merits of this claim.

2) Whether the movant will suffer irreparable harm if the stay is denied

MEBA states that equities favor a stay when the irreparable harm that would result from the loss of American seafaring jobs is weighed against the potential harm that a delay would cause the Applicants. In particular, MEBA contends that the jobs of MEBA licensed officers will be irretrievably lost once the Vessels are transferred. In support of its conclusion that irreparable harm will result from the transfer, MEBA cites to MARAD's statements in the Order acknowledging the unusual nature of the fleet transfer and our reluctance to approve the applications as clear evidence of the irreparable harm that will result. However, MARAD's reluctance to approve the applications reflects concern about the potential for loss of American seafaring jobs, and was overcome by the Applicant's proposal to retain U.S. seafarers and the conditions imposed in the Order. Our decision clearly was predicated on the impact on American seafarers in general and not on the impact to a specific labor union.

MEBA has not demonstrated that the reflagging of the Vessels will cause irreparable harm to American seafarers or to MEBA licensed officers. The conditions in the Order ensure that the Applicants will continue to employ American seafarers for at least five years, and MEBA has provided no evidence that its members will be unable to find employment elsewhere in the industry.

Presumably as part of its irreparable harm argument, MEBA also contends that the conditions of the transfer order and the possible \$1 million dollar bond do not provide a means for MARAD to force the return of the Vessels to the U.S.-flag and to return the parties to the *status quo ante* should the Court of Appeals find that the Order is unlawful. In the first place, the conditions in the Order were

not designed to ensure that the Vessels could be returned to the U.S.-flag. The conditions were imposed by MARAD in order to ensure that the Vessels remain available for requisition, that the Applicants maintain the Vessels in a manner that is protective of the environment and the safety of the crew, that the Vessels continue to be crewed by qualified, trained seafarers, and that the Applicants continue to employ U.S. seafarers for at least five years. In the second place, MEBA has not demonstrated a nexus between failure to return the vessels and irreparable harm to itself, namely the prospect for continued employment of its licensed officers, as above discussed.

Finally, when their current contract was negotiated in March 1997, both MEBA and PRONAV clearly contemplated a reflagging event. The parties contracted for such a contingency, to wit: "[P]rior to any sale or transfer of an LNG carrier out of American registry, the Company agrees that it must first make the necessary arrangements with the Association for the escrow of such monies as may be due to the [individual licensed officers] under the Shipman Award. Sec. XVI effective July 1, 1990" (MEBA ltr. to MARAD citing to Section XVI of the Shipman Award, effective July 1, 1990, November 29, 1999). Thus, MEBA members obtained the right to substantial compensation to be paid to its members in the event the shipowner reflagged the vessels prior to expiration of their labor contract. MEBA successfully secured this liquidated damage award on behalf of MEBA's members.

For all these reasons, MEBA has not demonstrated to this agency irreparable harm to its licenced officers if the stay is denied.

3) **Whether other parties will suffer substantial harm if the stay is granted.**

The Applicants state in their December 21, 1999 filing:

"The applicants' failure to describe the harm that would result from the requested stay should not be taken as a concession that there would be none. In order to ensure the availability of U.S.-citizen officers to man the vessels once they are reflagged, PRONAV has already incurred substantial costs in compensating those officers, in effect, simply to wait for the already long-delayed administrative process to be completed. A stay would further aggravate that financial loss, which can never be recouped."

Applicants did not quantify the ongoing costs resulting from a stay.

MEBA responds that "the financial interests of foreign entities is irrelevant" and that the lease-financing applicants are unaffected by the proposed reflagging. Yet, we note that the lease-financing applicants as well as PRONAV and BLNG, Inc. have moved to intervene in the court case.

It is concluded that Applicants have not demonstrated to the agency that "other parties" will suffer substantial harm if the administrative stay is granted.

4) Whether the public interest is served by granting the stay.

Neither MEBA nor the Applicants raised issues separately identifying public interest concerns in regard to whether or not the stay is granted. The public interest was carefully considered in the November 3, 1999 Order. MARAD is not persuaded that the Order was in error.³

V. CONCLUSION

MARAD believes that its November 3, 1999 Order approving the transfer of the Vessels is lawful and that a stay of the Order is not warranted. MEBA has not provided any new information to MARAD that was not considered during the extensive evaluation of the transfer applications and the

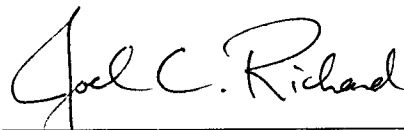
³Consideration of MEBA's petition in no manner is a waiver of rights the U.S. Government may have in continued litigation in *District No. 1, Pacific Coast District, Marine Engineers' Beneficial Association v. United States*, No. 99-1517, U.S. Court of Appeals (D.C. Cir. filed Dec. 9, 1999), including affirmative defenses of lack of standing and ripeness.

preparation of the November 3, 1999 Order, has not demonstrated a strong likelihood that it would prevail on the merits of its claim, and has not demonstrated that it would suffer irreparable harm.

Accordingly, the request for a stay of MARAD's November 3, 1999 Order is denied.

SO ORDERED
BY THE MARITIME ADMINISTRATOR

DATED: December 23, 1999

A handwritten signature in cursive script that reads "Joel C. Richard". The signature is written in dark ink and is positioned above a horizontal line.

JOEL C. RICHARD
Secretary
Maritime Administration